BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

JAMES A. BOHANNAN)
Claimant)
VS.)
) Docket No. 1,048,047
NORTHWEST PIPE OF KANSAS)
Respondent)
AND)
)
SENTRY INSURANCE COMPANY)
Insurance Carrier)

ORDER

Claimant appeals the May 25, 2010, preliminary hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). The ALJ entered this Order following a remand from the Board. Claimant was denied benefits after the ALJ determined that claimant had failed to prove that he suffered accidental injuries which arose out of and in the course of his employment with respondent.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Jeff McMillian held January 8, 2010; the transcript of Preliminary Hearing held March 2, 2010, with attachments; and the documents filed of record in this matter.

<u>Issue</u>

Did claimant suffer accidental injuries to his low back which arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant had been employed by respondent as a slitter operator for approximately 11 years. Claimant alleges that on or about February 9 or 10, 2009, he suffered an injury to his low back when his glove became entangled in a piece of steel, twisting claimant around and causing him to sit on the ground. Claimant alleges that he suffered pain in his low back due to that incident. Claimant testified that he told Steve Meeks, the plant superintendent, that he had injured himself at work and he would seek medical treatment the following Monday. However, employment records from respondent verify that claimant worked every Monday in February 2009 after the alleged date of accident. Mr. Meeks testified that claimant never talked to him about a work-related back injury in February 2009. Claimant alleges that he suffered a second work-related injury on June 10, 2009, when he was reaching over and banding steel. Claimant described the start of back pain with pain in his low back and legs. Claimant testified that he told Mr. Meeks the next day. Again, Mr. Meeks denied knowledge of this alleged accident.

Claimant was examined by family practitioner Chad Johanning, M.D., on March 9, 2009. Claimant gave Dr. Johanning a history of waking up "about two weeks ago" when he "started having lower back pain." Claimant advised the doctor that he had suffered "no trauma" and "[h]e woke up with it".2 There is no mention of a work-related injury. Claimant told Dr. Johanning that he had sought the aid of a chiropractor, and claimant underwent an MRI on February 27, 2009. The MRI displayed past spinal surgery at L5, a broad-based disc bulge at L5-S1 with a moderately prominent left sided focal disc protrusion. Claimant was diagnosed with degenerative disc disease with radiculopathy and back spasm. During a followup exam on May 4, 2009, claimant discussed additional symptoms including bilateral joint pains in his elbows, wrists, knees and ankles. Claimant discussed cramps in his fingers at work but related none of the other symptoms to his employment. Claimant underwent physical therapy and epidural injections during his treatment with Dr. Johanning. The epidural injections did provide complete relief for 48 to 72 hours, but the radiculopathy returned. Dr. Johanning's report of June 18, 2009, contains no mention of a work-related accident on June 10, 2009. Claimant continued treatment with Dr. Johanning through September 14, 2009. The medical reports of Dr. Johanning fail to note a work-related component to claimant's ongoing complaints. In his note of August 24, 2009, Dr. Johanning provided restrictions for claimant consisting of no greater than 20 pounds lifting for two weeks.

The restrictions were provided to respondent. As a result, a letter was provided to claimant from Jeff McMillian, human resources director for respondent. That letter, dated August 25, 2009, and marked as respondent's exhibit A in the preliminary hearing,

 $^{^{1}}$ Claimant testified that the accident happened on a Friday, which would be February 13. See P.H. Trans. at 10.)

² P.H. Trans., Resp. Ex. B.

discussed respondent's unwillingness to provide accommodated work after a personal injury. Claimant acknowledged that he did nothing to correct the obvious misconception that he had suffered a personal injury. The letter also specified that claimant would be required to be evaluated by John Growney, M.D., the company doctor, before claimant would be allowed to return to work for respondent.

Claimant was referred by Dr. Johanning to neurosurgeon David P. Fritz M.D., for an evaluation on April 13, 2009. Claimant advised Dr. Fritz that he awoke on February 22, 2009, with significant low back pain. The history contains no mention of a work-related injury. Dr. Fritz diagnosed a possible recurrent herniated disc. A rheumatological work-up was recommended for aches in claimant's arms.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation physician Lynn A. Curtis, M.D., on October 21 and 27, 2009. For the first time, the record contains a report of work-related injuries while claimant was working for respondent. The history provided by claimant to Dr. Curtis discusses injuries suffered on February 27, 2009, while claimant was "slitting" quarter wall steel for respondent. A June 29, 2009, date of accident describes an incident when claimant amoutated a portion of his left thumb. The extent of the amputation is not fully described in this record, but Dr. Curtis' report does discuss regrowth of claimant's nail bed along the amputation line. Claimant also advised Dr. Curtis of a June 1, 2009, incident when his back went out while binding strips of steel at work. This caused the pain in claimant's back and right leg to worsen and pain in his neck and arms to continue. Claimant was diagnosed with injuries to his cervical, thoracic and lumbar spine and a left thumb amputation. Dr. Curtis rated claimant pursuant to the fourth edition of the AMA Guides³ at 5 percent to the whole body for the cervicothoracic injury. 10 percent to the whole body for the thoracolumbar spine injury and 56 percent to the left thumb or 22 percent to the hand for the amputation. (It is noted that the amputation injury is not part of this litigation).

Claimant was referred by Dr. Growney to board certified orthopedic surgeon Thomas L. Shriwise, M.D., for an evaluation on December 14, 2009. The initial referral was on November 24, 2009, but several attempts to complete the examination were unsuccessful. Claimant reported back pain and stiffness, as well as tingling in his arms and legs. An L5-S1 discectomy in 2007 by Dr. Fritz was described as resulting in a "very good recovery". Claimant advised Dr. Shriwise of two accidents while working for respondent. Both the February and June accidents were described to Dr. Shriwise. Claimant was restricted by Dr. Shriwise to a 50-pound bench level lift and 20 pounds of occasional lifting. He also noted, with approval, the 10-pound lifting and carrying restriction

³ American Medical Association, Guides to the Evaluation of Permanent Impairment (4th ed.).

⁴ P.H. Trans., Cl. Ex. 2.

of Dr. Growney. However, Dr. Shriwise opined that claimant would be unable to return to his regular job with respondent lifting 50 pounds frequently and 100 pounds.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁵

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁶

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁷

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."

Claimant alleges two separate accidents to his low back while working for respondent. Claimant contends that he told several of respondent's employees of these accidents, but the employees deny any knowledge of a work-related connection between claimant's pain complaints and his job. Additionally, claimant sought medical treatment with Dr. Fritz and Dr. Johanning on his own. He failed to advise either doctor that his

⁵ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

⁶ In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

⁷ K.S.A. 2008 Supp. 44-501(a).

⁸ Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984); citing Newman v. Bennett, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

complaints were related to his employment with respondent. The first mention of a work-related connection between claimant's job and his pain complaints did not occur until claimant was referred by his attorney to Dr. Curtis on October 21 and 27, 2009, months after the dates of the alleged accidents.

In this instance, the ALJ had the opportunity to observe not only the testimony of claimant but also the testimony of three other employees of respondent. In determining whether claimant's allegations that he told respondent's employees of these accidents rang true, the ALJ found claimant's contentions lacking. This Board Member agrees. Claimant contended that he told respondent of the accidents. But he then proceeded to go to doctors of his own choosing, receiving several months of treatment without mentioning the work-related connection with these pain complaints. This, coupled with the testimony of respondent's employees, convinces this Board Member that claimant's pain complaints were not the result of work-related accidents. The denial of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

Conclusions

Claimant has failed to prove by a preponderance of the evidence that he suffered accidental injuries on February 13, 2009, June 10, 2009, and through a series of microtraumas through June 29, 2009, while working for respondent. The denial of benefits in this matter is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Rebecca Sanders dated May 25, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

⁹ K.S.A. 44-534a.

Dated this	day of August,	2010.
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HONORABLE GARY M. KORTE

c: Roger D. Fincher, Attorney for Claimant
David P. Mosh, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge